IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 78-6386

WILLIAM JAMES RUMMEL,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR THE RESPONDENT

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INDEX

INDEX (continued)

TABLE OF AUTHORITIES

CASE **Page**

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

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OPINIONS BELOW

The en banc opinion of the Court of Appeals (A. 25)[1] is reported at 587 F.2d 651. The panel opinion of the Court of Appeals (A. 9) is reported at 568 F.2d 1193. The opinion of the district court (A. 4) is not reported.

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[1]For ease of reference, Respondent, like Petitioner, will cite the record on appeal as "R"; the separately bound Appendix as "A"; Petitioner's separately bound charts as "C"; and Respondent's separately bound Supplement as "S."

JURISDICTION

Petitioner's jurisdictional statement (Brief for the Petitioner at 2) is acceptable.

QUESTIONS PRESENTED

WHETHER RUMMEL'S SENTENCE OF LIFE IMPRISONMENT FOR BEING AN HABITUAL CRIMINAL IS CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT?

WHETHER RUMMEL HAS PROCEDURALLY DEFAULTED ANY RIGHT TO CHALLENGE HIS PUNISHMENT AS CRUEL AND UNUSUAL BY FAILING TO OBJECT UPON THAT OR ANY OTHER BASIS AT THE PUNISHMENT STAGE OF HIS TRIAL?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Petitioner cites and sets forth the Eighth Amendment to the United States Constitution; Sec. 12.42(d) of the 1974 Texas Penal Code: Arts. 63, 979, 996, 1410, 1413, and 1555b, sec. 1, of the 1925 Texas Penal Code (Brief for the Petitioner at 2-5). The following statutes and rules are also involved, and are reproduced in the Supplement "S.":

Tex. Rev. Civ. Stat. Ann. art. 6181-1, secs. 1-4 (Vernon) (S. 1)

Tex. Code. Crim. Proc. Ann. art. 42.12, secs. 12, 15, 20 (Vernon) (S. 2)

Rules, Texas Board of Pardons and Paroles, secs. 205.03.02.001(a)-(h); 2.05.03.02.005; 2.05.03.02.007 (1978) (S. 3).

STATEMENT OF THE CASE

The textual portion of Petitioner's Statement of the Case (Brief of the Petitioner at 5-8) is adequate, except that he neglects to note that the record reflects that at the time of his conviction as an habitual criminal, there were also other charges pending against him (A. 1-2), at least one of which resulted in a felony conviction (A. 3) additional to that for which he received his life sentence, as found by the Court of Appeals (587 F.2d at 659; A. 37). A further glimpse of Rummel's entire criminal history is provided by the recitation of his prior commitments to the Texas Department of Corrections. (*See* footnote three at 13.)

Also, at the punishment stage of Rummel's bifurcated trial, no objection was made that the imposition of a life sentence constituted cruel and unusual punishment. Instead, Rummel merely informed the trial court that the enhancing allegations in his indictment were true. (R. 226-27). His attorney after some discussion affirmatively stated to the trial court that he had "no objection" to the jury instructions upon the issue of punishment (R. 239-41).

SUMMARY OF ARGUMENT

I. A. No decision of this Court has ever held that a sentence of imprisonment transgressed the Eighth Amendment solely because of its length. It is doubtful that the Founding Fathers ever intended the mere length of a sentence, as opposed to the manner of infliction of a barbarous punishment, to be proscribed by the Eighth Amendment. Quite recently in the context of death penalty cases the Court has written much about Eighth Amendment proportionality analysis. The Court should now announce that many of the dicta in those cases, especially *Coker v. Georgia*, 433 U.S. 584 (1977), are limited in applicability to death penalty cases. This conclusion seems appropriate in

light of the uniquely irrevocable nature of capital punishment. At the very least, the Court should be considerably more reluctant to strike down a revocable punishment like Rummel's than an irrevocable one like Coker's.

B. In any event, Rummel's punishment is constitutionally valid even under properly applied Eighth Amendment proportionality analysis established in *Coker* and other cases. Rummel has demonstrated and owes his habitual offender status to the fact that he is utterly incapable of conforming his conduct to the norms of civilized society. He himself has shown that three prior prison terms have failed to rehabilitate him. The expressed judgment of a Texas prosecutor, grand jury, petit jury, trial court, and appellate court that additional punishment is necessary is not so clearly wrong that its imposition is barred by the Constitution. To contend otherwise, in fact, is, in light of the crude state of the infant science of criminology, to trivialize the Constitution.

This conclusion is particularly clear where Texas' entire statutory scheme, including the operation of relevant good conduct time credit and parole statutes and rules, are considered. Two Circuit Courts of Appeals have properly held that to consider only the sentence imposed upon a convicted criminal defendant and to refuse to consider the practical effects of that sentence would be self-imposed judicial myopia. Examination of the Texas good conduct time credit and parole laws, especially when compared with those of other jurisdictions, reflects that Rummel's sentence is commensurate with that he might have received in other jurisdictions. It is also clear that his actual term of incarceration will be significantly shorter than that of other, more serious offenders also receiving life sentences. The reality is that Rummel's sentence is not disproportionate to the offenses he commited and the

mental state the commission of those offenses evinced.

C. Examination of the same Texas statutes and rules also shows that Rummel's claim that he is a "perpetual prisoner" (Brief of Petitioner at 37) is without merit. If he manifests the indicia of rehabilitation after being paroled in as little as ten years, he may attain annual reporting status in three years and non-reporting status in four additional years. Thus, after ten years in prison and seven years of satisfactory parole, Rummel may achieve a status wherein he practically can only be returned to prison for actual conviction of a crime. This hardly seems too much to ask for an adjudicated habitual criminal. Surely the Texas framework for treatment of recidivist offenders represents a rational effort to rehabilitate them, clearly an acceptable goal of punishment.

D. To embrace a contrary rule would be in the language of Fifth Circuit Judge Thornberry, to "stand on the brink of the 'slippery slope' in its most classic sense." The subjectivity inherent in Rummel's position would necessarily result in chaos and uncertainty in the Texas and many other criminal justice systems. The extent to which the filing of massive numbers of habeas corpus petitions might open the prison floodgates is essentially an unknowable but potentially important factor. Even more important, however, is the uncertainty as to the law on the part of prosecutors, grand juries, and judges. No remotely objective rule of decision is conceivable.

The judgment of the Texas or any other state Legislature, which had been thought to be conclusively demonstrated by the passage of criminal statutes, would no longer be a reasonable basis for the exercise of prosecutorial or judicial discretion. Instead, every criminal justice system would be subject years later to the scrutiny of federal judges and their necessarily

subjective notions of the proper ends of punishment. The costs of such a system of criminal justice simply outweigh any benefits. The inevitable effect would be to eliminate differences in punishment provisions of substantive criminal statutes among the states and to work a "levelling" of approaches among the states. Such a stifling result is undesirable practicably and obnoxious philosophically insofar as it eliminates opportunities for difference of approach in an area of human experience, penology and the rehabilitative process, in which certainties are few.

II. Rummel has procedurally defaulted any right to raise his Eighth Amendment claim in federal habeas corpus under *Wainwright v. Sykes*, 433 U.S. 72 (1977). The reason is that he failed to object at his trial to the imposition of his life sentence on that basis, thereby violating the Texas correct contemporaneous objection rule.

The State of Texas raised this defense on appeal--its first opportunity after this Court's decision in *Sykes*. Because the Texas courts do not allow such a claim as Rummel's to be raised for the first time on collateral attack, this Court in the interest of comity should also refuse to entertain it.

ARGUMENT

I.

RUMMEL'S SENTENCE OF LIFE IMPRISONMENT FOR BEING A HABITUAL CRIMINAL IS NOT CRUEL OR UNUSUAL UNDER THE EIGHTH AMENDMENT.

Certainly Texas agrees, in the often quoted words of Mr. Chief Justice Warren, that the Eighth Amendment "must draw its meaning from the evolving standards of

decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). But to assert that Rummel's punishment is barred by the Eighth Amendment is a misapplication of that principle, both historically and logically.

A. This Court Has Never Held that a Sentence of Imprisonment in a Criminal Case Transgressed the Eighth Amendment Solely Because of its Length.

Perhaps the first case in which this Court squarely addressed the meaning of the cruel and unusual punishment clause of the Eighth Amendment was *Wilkerson v. Utah*, 99 U.S. 130 (1879), where the Court upheld the constitutionality of shooting as a form of execution. The Court believed "it is safe to affirm" that the Eighth Amendment forbids such forms of punishment as being "embowelled alive, beheaded, and quartered . . . public dissection . . . and burning alive." *Id.* at 135-36. *Accord, In re Kemmler*, 136 U.S. 436 (1890), where the Court upheld electrocution as a means of inflicting the death penalty.

Next, the Court upheld a second electrocution after the first attempt had been unsuccessful in *Louisiana v. Resweber*, 329 U.S. 459, 464 (1947). The reasoning was as follows:

> "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

The crux of Rummel's argument is that the Eighth Amendment requires that the punishment carried out against a convicted defendant be proportionate to the offense committed. Apparently the first expression emanating from this Court that has been construed as

supporting this view was the dissenting opinion of Mr. Justice Field in *O'Neil v. Vermont*, 144 U.S. 323 (1892). There, the defendant was heavily fined and sentenced to serve more than fifty-four years at hard labor for the offense of selling intoxicating liquors without authority. Three members of the Court would have barred the punishment as cruel and unusual. The majority, however, refused even to address the contention.

In *Howard v. Fleming*, 191 U.S. 126 (1903), the Court rejected an Eighth Amendment challenge to a sentence of ten years imposed for conspiracy to defraud. In *Badders v. United States*, 240 U.S. 391 (1916) (Holmes, J.), the defendant claimed that a thirty-five year prison sentence, five years for each of seven separate letters deposited in the mail as part of a scheme to defraud, was disproportionate to the offense. The Court rejected this contention.

In *Weems v. United States*, 217 U.S. 349 (1910), the most noted case in this context, the Court considered the validity under the Philippine Bill of Rights the Hispanic sentence of fifteen years in *cadena temporal*. The Court noted that this sentence consisted not merely of fifteen years simple imprisonment for a minor offense, but of fifteen years of hard and painful labor, with chains at ankle and wrist, accompanied by various other civil disabilities far in excess of those associated with modern American parole, both during the term of imprisonment and afterward. It is highly doubtful that without such accessory punishments the Court would have reached the same result. *Weems* is not a case in which it may fairly be said that length of the sentence alone was the basis of decision.

In *Trop v. Dulles*, 356 U.S. 86 (1958), the defendant was sentenced to three years hard labor, loss of citizenship, and other penalties for an act of wartime desertion. The Court held that denationalization is a punishment barred by the cruel and unusual

punishment clause of the Eighth Amendment. In light of such authorities, it is not surprising that in *Spencer v. Texas*, 385 U.S. 554 (1967), the Court simply noted that on numerous occasions the habitual offender statutes of various jurisdictions had been upheld against challenges that the imposition of a life sentence constituted cruel and unusual punishment.[2]

Several factors should be noted as important in contributing to the formulation of this mass of authority. First, it is improbable that the Framers intended the Eighth Amendment to apply merely to long punishments. Instead, "[I]t appears that the American draftsmen believed that the original intention was to prohibit the inflicting of barbarous physical punishments." Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF.L.REV. 99, 115 (1971). A contrary conclusion is apparently based on the argument that the Founding Fathers "were mistaken in their interpretation of the English experience" and so erred in intending to prohibit only punishments that are cruel and unusual in their nature. *E.g.*, Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF.L.REV. 839 (1969). This method of historical exegesis is wholly insupportable.

Finally, there are the death penalty cases. Generally, the Court has held that capital punishment is not unconstitutional per se. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). Yet in cases such as *Furman v. Georgia*, 408 U.S. 238 (1972), and *Coker v. Georgia*, 433 U.S. 584 (1977), some members of the Court expressed the opinion that the death penalty constitutes cruel and unusual punishment. For example, in *Coker*, 433 U.S. at 591-92, the Court held:

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[2]A more complete historical statement of the Eighth Amendment is contained in the various opinions of the Court in *Furman v. Georgia*, 408 U.S. 238 (1972).

> "In sustaining the imposition of the death penalty in *Gregg*, however, the Court firmly embraced the holdings and dicta from prior cases [citations omitted] to the effect that the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Under *Gregg*, the punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground."

Such cases should not control the outcome of a case like Rummel's, not involving the death penalty. The reason is that the imposition of the death penalty itself occupies a unique place in Eighth Amendment jurisprudence because of its awesome and irrevocable nature, as this Court and others have said. *E.g.*, *Coker v. Georgia*, 433 U.S. at 598, *citing Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Furman v. Georgia*, 408 U.S. at 290 (Brennan, J.) and 346 (Marshall, J.); *Carmona v. Ward*, 576 F.2d 405, 409, 415 (2nd Cir. 1978), *cert. denied*, ___U.S.___, 99 S.Ct. 874 (1979); *Hall v. McKenzie*, 537 F.2d 1232, 1235 (4th Cir. 1976). This seems quite proper in light of the constant reviewability by many different means -- *e.g.*, habeas corpus, parole, pardon -- of non-capital punishment.

For these reasons, if proportionality in sentencing is to be required by the Eighth Amendment, then history, precedent, and logic all suggest that at least in the context of punishment less than capital, every reasonable presumption should be indulged in favor of the rationality and, therefore, the constitutionality, of the particular punishment in issue.

B. Consideration of the Entire Texas Statutory Scheme for Infliction of Punishment in Criminal Cases, Especially when Compared to the Schemes of other Jurisdictions, Reflects that Rummel's Punishment is Not Cruel or Unusual.

For the reasons stated above, the Court should more readily accede to the punishment Texas has inflicted upon Rummel than it did the ultimate punishment Georgia unsuccessfully sought to impose upon Coker in *Coker v. Georgia*, *supra*. Yet properly applied proportionality analysis espoused by any Justice or judge of any court--whether this Court in *Coker*, or the Fourth Circuit Court of Appeals in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974), or the dissenters in the court below -- fails to establish that Rummel's sentence is cruelly or unusually disproportionate to his offenses.

1. Rummel's adjudication under Texas law as a habitual criminal justifies severe punishment.

In 1856 the Texas Legislature enacted a statute pertaining to habitual offenders. Paschal, I Laws of Texas 472 (1873). The Texas Penal Code of 1856, art. 2464, provided:

> "Any person who shall have been three times convicted of a felony less than capital, shall, on such third conviction, be imprisoned to hard labor for life, in the penitentiary."

This provision was preserved verbatim in subsequent codifications of the Texas Penal Code. Texas Penal Code of 1879, art. 820; Texas Penal Code of 1895, art. 1016; Texas Penal Code of 1911, art. 1620.

In 1925 and 1974 the Texas Legislature modified the former recidivist statute:

> "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

Texas Penal Code of 1925, art. 63.

* * * *

> "If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life."

Tex. Penal Code Ann., sec. 12.42 (Vernon). This section retains the substance of the former provisions.

These statutes have always been strictly construed in Texas, as discussed at some length in the opinion of the Court of Appeals (587 F.2d at 656; A. 31-32) and the Brief of the Petitioner at 57 n.67. First, to invoke these provisions the State must prove that each succeeding conviction was subsequent to both the commission of and conviction for the preceding offense. *Tyra v. State*, 534 S.W.2d 695, 697-98 (Tex. Crim. App. 1976); *Rogers v. State*, 325 S.W.2d 697 (Tex. Crim. App. 1959). No conviction can be used more than once in establishing habitual criminal status. *Ex parte Montgomery*, 571 S.W.2d 182, 183 (Tex. Crim. App. 1978); *Carvajal v. State*, 529 S.W.2d 517, 521 (Tex. Crim. App. 1975), *cert. denied*, 424 U.S. 926 (1976). These requirements ensure that a habitual criminal is truly one who has exhibited over a long period of time the inability to conform his conduct to the dictates of the criminal law.

Also, a defendant must actually have spent time in prison upon a conviction before it may be used for enhancement. *Cromeans v. State*, 268 S.W.2d 133, 135 (Tex. Crim. App. 1954). This requirement ensures that a long prison term cannot be imposed until the defendant by his own conduct has demonstrated that shorter terms have failed to rehabilitate him.[3]

Moreover, an out-of-state felony conviction cannot be used for enhancement unless the underlying offense was also a crime in Texas. *Ex parte Scafe*, 334 S.W.2d 170, 171 (Tex. Crim. App. 1960). Mere introduction of certified copies of prior judgments and sentences is insufficient to prove identity of the defendant. *Cain v. State*, 468 S.W.2d 856, 858-59 (Tex. Crim. App. 1971). These and other requirements are designed to afford maximum due process of law to those threatened with habitual offender status.

Thus, as stated by the Court of Appeals, "the following events must happen before Article 63 [or Section 12.42(d)] is ever called into question:

> (1) A defendant must be convicted of a felony and must be sent to prison.
> (2) After the defendant has been convicted of the first felony, he must be convicted of a second

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[3]In the instant case, according to records contained in the Texas Department of Corrections, in addition to juvenile commitments and several short terms in city jails, Rummel served almost eight months in 1965 in the Texas Department of Corrections on his 1964 conviction for theft by credit card before being paroled on September 28, 1965. His parole was revoked on July 21, 1966, and he served nine additional months before being discharged on May 25, 1967. He was returned to the Texas Department of Corrections on March 25, 1969, to serve a four year sentence received following his conviction for forgery. He was discharged on March 26, 1971. Following his two additional felony convictions on April 10, 1973, he arrived in the state penitentiary for the fourth time, where he has remained ever since.

> felony. Again, the defendant must be given a prison term.
> (3) After the defendant has been convicted of the second felony and sent to prison for the second time, the defendant must be convicted of a third felony." (footnote omitted)

(587 F.2d at 656-57; A. 32.)

According to an authority relied upon by the Court of Appeals -- Note, "Don't Steal a Turkey in Arkansas -- The Second Felony Offender in New York," 45 FORDHAM L. REV. 76, 78-79 (1976), most states do not afford the same range of protection to accused habitual offenders:

> "Other states require that the defendant have been previously convicted, sentenced and 'placed on probation, paroled, fined *or* imprisoned....' Florida demands a 'formal adjudication of guilt,'.... In other jurisdictions, a verdict or a plea of guilty is all that is necessary to implement added sanctions. Other opinions indicate that simultaneous, multiple convictions may be used for the purpose of applying recidivist statutes." (footnotes omitted).

(587 F.2d at 657; A. 32.)

Thus, Rummel was duly and legally convicted of committing four felony offenses over a period of nine years in Bexar County, Texas. The record does not fully reflect what other offenses the district attorney knew that Rummel had committed during this time, although the decision of a prosecutor to exercise his discretion to seek a sentence of life and that of a grand jury to exercise its discretion to return a habitual offender indictment under these circumstances is commonly spurred by

such considerations.[4]

It is fundamental, therefore, that Petitioner did not receive a life imprisonment merely because he committed three offenses totaling $230.00 in booty. He did not receive such a sentence merely because the prosecutor knew that he stood convicted of a total of four felony offenses over a period of nine years, nor merely because the prosecutor knew of other crimes he had committed.

Instead, Rummel received a sentence of life imprisonment because over a long period of time he had exhibited a total inability to conform his conduct to the norms established by civilized society. That imprisonment for various terms shorter than life imprisonment had failed to effect either his rehabilitation or to achieve any deterrent effect within him is tautologically obvious. For such a pattern of consistently criminal conduct, Rummel eventually received his life sentence. It is absurd to suggest that the slowly emerging science of criminology is sufficiently precise to establish with any degree of certainty that the approach taken is doomed to failure or that any other approach would guarantee success.

2. Texas' liberal good conduct time credit and parole statutes and rules operate so as to significantly diminish the superficial harshness of a "life sentence" in Texas in comparison to other jurisdictions.

It is impossible to assess the true meaning of

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[4]Texas, aware of the appendix to the amicus curiae brief filed by the district attorney, Bexar County, Texas, containing certified copies of Rummel's numerous convictions, asks that the Court note the alternative prayer for relief in the Conclusion that this cause be remanded to the district court for consideration of "all the circumstances of Rummel's entire criminal history."

Rummel's sentence or to compare it to others without a close examination of several Texas statutes. First, it is established in Tex. Code Crim. Proc. Ann. art. 42.12, sec. 15(b) (Vernon) that any prisoner is eligible to be paroled provided that he has served one-third of the maximum sentence or twenty years. (S. 2) That statute further provides that except in the case of certain enumerated violent crimes -- murder, kidnapping, rape, sexual abuse, and robbery -- all inmates "shall be eligible for release on parole when their calendar time served plus good conduct time equals one-third of the maximum sentence imposed or 20 years, whichever is less." *Id.*

The Texas statutes also provide for the awarding of additional time credit for good conduct while in prison. Tex. Rev. Civ. Stat. Ann. art. 6181-1 (Vernon) -- formerly art. 6184-l -- provides that prisoners are entitled to twenty days per month deduction in time from the terms of their sentences for Class I prisoners, ten days per month for Class II prisoners, and thirty days per month for a state approved trusty. (S. 1)

The Rules of the Texas Department of Corrections provide that an entering inmate begins as a Class I prisoner and so receives twenty days per month credit on his sentence, or a total of fifty days credit on his sentence for each month spent in the penitentiary. Thus, even if an inmate never achieved the status of trusty, he would accumulate fifty days of time credit for each month served. A twenty year sentence in this manner could be and commonly is served by a Class I prisoner in a little more than twelve years. (*See* S. 12, S. 13, S. 15 Table 28).

If a prisoner achieved trusty status, he could serve a twenty year or a life sentence in ten years. The Court of Appeals so found. (587 F.2d at 658; A. 34.) Available statistical evidence from various sources corroborates this conclusion. (*See* S. 9-13, S. 15 Table 28, S. 16).

Hence, it follows that Rummel has in fact received an indeterminate sentence. He may be released in as little as ten years. On the other hand, if he evinces no demonstrable indicia of rehabilitation, he may never be released.

An examination of the good time and parole statutes of other jurisdictions is startling. (*See* S. 6-8.) Although the statutes of many other jurisdictions are similar to that of Texas in providing that inmates are eligible for parole after having served one-third of their sentence or twenty years,[5] virtually *no* other jurisdiction provides an opportunity comparable to the State of Texas in the awarding of good time credit. Virtually *all* such jurisdictions provide an opportunity for significantly less time credit.

To select one obvious example for comparative purposes, 18 U.S.C. §3575 provides for a sentence of twenty-five years for some habitual offenders. It is further provided in 18 U.S.C. §4161 that a federal prisoner may earn a maximum of ten days per month good time credit. Thus, the coalescing of these statutes means that a federal prisoner serving a sentence as an habitual offender might discharge that sentence in approximately sixteen years -- *six years longer* than the time in which a Texas habitual offender like Rummel might be released from incarceration upon his sentence. Texas contends that examination of the meaning of a life sentence or that sentence provided for by habitual offender statutes in other jurisdictions reveals that a Texas prisoner convicted of being an habitual offender and for that reason receiving a life sentence may serve significantly less time than similarly situated prisoners

[5] *See* NATIONAL COUNCIL ON CRIME AND DELINQUENCY, "Parole in the United States: 1976 and 1977" at 22, 48. (July, 1978). Parole eligibility varies greatly among states insofar as technical requirements are concerned, but one-third of maximum sentence is a common measure.

in most and possibly all such other jurisdictions if he evinces the indicia of rehabilitation.

Rummel urges that the Court refuse to consider the workings of the Texas good time and parole laws or to compare them to the workings of such statutes in other jurisdictions. First, he argues, like the original panel opinion in the Court of Appeals, "It is no answer to suggest that the sentence imposed may never be carried out in fact, because the threat itself makes the punishment obnoxious." (568 F.2d at 1196 n. 4.; A. 12.)

This statement simply distorts reality in a case like Rummel's. The Court might hypothesize a situation in which a convicted defendant like Rummel were confronted with a choice of punishment. Suppose that he were offered on the one hand a punishment such as that potentially posed by other statutes: that is, between, for example, sixteen and twenty-five years imprisonment, depending upon his conduct. Suppose that the alternative punishment were that provided by the Texas statute: that is, between ten years imprisonment and imprisonment for the remainder of his natural life, depending upon his conduct. Different defendants confronted with such a choice might vary significantly in their desires. Certainly, however, neither sentence is clearly so much more severe than the other that its infliction might be characterized as grossly disproportionate. Similarly, the Court of Appeals reasoned as follows:

> ". . . Rummel has made no attempt to demonstrate what the actual jail times in the various jurisdictions would amount to. An example will illustrate our point. Suppose that State A gives a ten year sentence for theft and State B gives a thirty year sentence for the same theft. State A has a practice of fixed and determinate sentence and does not award early release based on good time or discretionary

> parole. State B, however, is similar to Texas and through long experience it can be shown that the thirty year sentence amounts to about ten years' imprisonment. Can it justifiably be said that State B punishes the theft three times more severely than State A? This Court thinks not.
>
> A variation of this very possibility might be found in our own circuit. In Georgia, upon conviction of the fourth felony, the defendant receives the mandatory maximum without parole. Ga. Code Ann. §27-2511. Rummel's equivalent offense in Georgia is theft by deception, Ga. Code Ann. §26-1803, and the maximum penalty is ten years, Ga. Code Ann. §26-1812. Considering the no parole provision, Rummel's imprisonment in Georgia would be approximately the same as his imprisonment in Texas." (footnotes omitted)

(587 F.2d at 660; A. 38.)

Thus, it is obvious that it is a terrible oversimplification to assert that next to the death penalty, life is "the ultimate punishment imposed by this society for those crimes most abhorrent to it." (*E.g.*, *Rummel v. Estelle*, 568 F.2d at 1196; A. 13.) Instead, the ultimate such punishment must certainly be life imprisonment with no possibility of parole. Such a punishment is provided for in several states. (*See* C. 113 *et seq.*) Surely the second most severe punishment must be a sentence of life imprisonment in that jurisdiction that provides the least amount of good time credit during incarceration.

Far down the hierarchy must fall Rummel's sentence in the instant case. His sentence in this light may be seen as significantly less severe than that afforded in many other jurisdictions to habitual offenders such as himself or to other prisoners serving life sentences. The Court of

Appeals so found:

> "The record in this case reveals that Rummel was convicted of a fourth felony on the same day he was sentenced under Texas habitual offender statute. Three states punish a three time offender with a mandatory life sentence, and three states provide for a discretionary life sentence for a three time offender. Three states punish a four time offender with a mandatory life sentence, and eight states provide for a discretionary life sentence for a four time offender. Given these facts, it appears that up to a possible six states would sentence Rummel to a life term and up to eleven states would give discretion to the court to determine Rummel's sentence." (footnotes omitted.)

(587 F.2d at 659-60; A. 37.)

Moreover, because the Texas Board of Pardons and Paroles exercises its discretion to award release upon parole to prisoners serving life sentences for relatively less serious crimes *significantly sooner* than prisoners with life sentences serving more serious crimes (*See* S. 9, S. 10), it is obvious that the severity of a life sentence among Texas prisoners may also vary significantly. Therein lies the fallacy in stating that Texas has punished Petitioner disproportionately severely in comparison to other more vicious Texas criminals.[6]

There is no basis for the statement of the dissenters in the Court of Appeals and for Rummel's wholly uncorroborated assertion that "Texas is the most reluctant

[6]In a related argument, Petitioner complains that the habitual offender laws "isolate only petty offenders." (Brief for the Petitioner at 48-51). The obvious reason that few murderers or rapists are prosecuted under such statutes is that they commonly receive long sentences after one or two such offenses.

[State in the country] to grant parole." (587 F.2d at 658, 666; A. 35, 46; Brief for the Petitioner at 32-33.) All available evidence, in fact, indicates that Texas ranks approximately average in its willingness to approve parole applications. (*See* S. 15, Tables 2, 3, 21, 26, 28; S. 17.)

In fact, available statistics indicate that approximately forty per cent of inmates are granted parole in their *first year* of eligibility. Of those passed over, more than sixty-four per cent are granted parole in their second year of eligibility. By the third and fourth year of eligibility, the figure approaches one hundred per cent. (S. 16) Coupled with the much quicker rate at which Texas prisoners attain parole eligibility status, these figures strongly corroborate the conclusion of the Court of Appeals majority and the contention of Texas that it is extremely unfair and unrealistic to equate a Texas sentence with others of equal length in other jurisdictions.

To cause Rummel's life sentence to appear comparatively onerous, in fact, can only be achieved by focusing in a manifestly unfair and unrealistic manner upon a very small portion of the entire Texas statutory sentencing scheme. That scheme admittedly imposes upon Petitioner a sentence facially more extreme than that possible in numerous other jurisdictions, and possibly than in all of them. At the same time, however, the Texas statutes operate to reduce the length of the sentence much more than that possible in numerous other jurisdictions, and possibly than in all of them.

Texas cannot understand the logic by which the Eighth Amendment to the United States Constitution, especially in light of the uncertainties of "the infant science of criminology," *see McGautha v. California*, 402 U.S. 183, 221 (1971), may be interpreted to invalidate the Texas scheme of punishment -- which in reality may well cause Rummel to serve the same amount of time as

he would have served in many other jurisdictions for the offenses he committed and significantly less time than other more serious offenders in his own jurisdiction.

In this regard Texas relies heavily upon the reasoning of the Second Circuit Court of Appeals in *Carmona v. Ward*, 576 F.2d 405, 413-14 (2d Cir. 1978), *cert. denied*, ___U.S.___, 99 S.Ct. 874 (1979):

> "We cannot agree that the recognized probablility of parole in cases before us was to be ignored when the court determined whether the statutory punishment was unconstitutional as applied to appellees. On the one hand, we are asked to look at all the circumstances which would ameliorate the seriousness of petitioners' offenses and their individual culpability in order to justify a finding that their punishment was constitutionally offensive. On the other hand, we are asked in effect to consider the appellees so incorrigible that they must be deemed destined to durance vile for the rest of their natural lives because they will never be paroled. We do not consider this to be a realistic or practical approach."

Finally, further precedential support for consideration of the *entire* statutory scheme of punishment in Texas and, therefore, the operation of its time credit and parole statutes and rules, is found in the cogent statement of Mr. Justice Marshall in *Furman v. Georgia*, 408 U.S. 238, 361 (1972):

> "[W]hether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether *people who were fully informed as to the purposes of the penalty and its liabilities* would find the penalty shocking, unjust, and unacceptable." (emphasis added).

Surely the Court must allow itself to be thusly fully informed before passing judgment on the manner in which Texas has promulgated and e· .forced its criminal statutes in the instant case.

C. There Is A Rational Basis For Concluding That Rummel's Sentence Will Contribute To Acceptable Goals of Punishment.

Texas believes that all the foregoing establishes that the Texas system of punishment is both rational within itself because it differentiates insofar as actual penitentiary time is concerned among various types of offenders and also rational compared to other penal systems insofar as such time is concerned. Texas also notes that "Rummel cannot gain any advantage by positing a more rational system than the one in existence: He must demonstrate that the system in existence is an irrational one." (*Rummel v. Estelle*, 587 F.2d at 662; A. 41.)

Rummel makes two further attacks upon the rationality of the Texas system. First, he asserts that "if a life sentence without possibility of parole for three petty, nonviolent offenses would be unconstitutional . . . then surely the added 'crime' of a 'bad attitude' in prison, virtually guaranteeing rejection of a prisoner's parole application and assuring him of lifetime imprisonment, should not make the sentence any less constitutionally infirm." (Brief for the Petitioner at 35). Of course, this view greatly oversimplifies the parole process and trivializes the work of the Texas Board of Pardons and Paroles. A full discussion and enumeration of the Board's guidelines and rules concerning parole are set forth in S. 14.

Second, Rummel incredibly asserts that the prospect of parole itself is depressing and destructive of the proper ends of punishment:

> "Thus, Rummel is a perpetual prisoner. No matter how much he rehabilitates during the next approximately 13,770 days of his life expectancy, he will either die in prison or live on perpetual parole, with the ever-present possiblity of re-incarceration. Such a depressing prospect will inevitably breed hopelessness and preclude effective treatment and rehabilitation."

(Brief for the Petitioner at 37.)

There are several reasons why this melodramatic portrayal of parole in inaccurate. First it should be noted that the terms and conditions of parole in Texas, which are set forth in S. 3-5, are not more onerous than those employed generally in the United States. *See* LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, "Sourcebook of Criminal Justice Statistics - 1978," Table 1.121 at 220-21 (June, 1979). The Court of Appeals, in fact, reacted to Rummel's complaint in this regard as follows:

> "Rummel suggests that even if he is paroled, he is still on probation and lifetime probation is in itself cruel and unusual punishment. This argument need not detain us long. We cannot understand how a lifetime requirement of good behavior is too much to ask of a habitual criminal."

(587 F.2d at 659 n. 19; A. 36.)

Second, Rummel has in any event badly misstated his situation. The Rules of the Board provide that after a paroled habitual offender satisfactorily completes three years of monthly reporting supervision, he may be placed on annual reporting status. RULES, Texas Board of Pardons and Paroles, sec. 205.03.02.005; S. 4.

Such status greatly reduces his obligations while on parole -- and, concomitantly, greatly reduces the reasons why his parole can be revoked. Equally important, the parolee need only report once per year *by mail.*

Further, after four years on annual reporting status, the parolee may attain non-reporting status. RULES, Texas Board of Pardons and Paroles, sec. 205.03.02.007; S. 4-5. Such status means that he need report his activities to no one -- not even in writing -- and most significantly, means essentially that his parole as a practical matter can only be revoked for actual criminal convictions.

Moreover, it appears that criminal and non-reporting status are routinely granted to those parolees who qualify by completing satisfactorily the requisite term. Finally, all available statistics demonstrate that the vast majority of Texas parolees satisfactorily complete their parole. (S. 1 Tables 4-11, 30).

This is not the status of a perpetual prisoner. Instead, these Rules are part of a system to carefully oversee the rehabilitation of the habitual and other types of criminals. The degree of freedom afforded such offenders is gradually escalated according to their conduct. Clearly the Texas plan for treatment of habitual offenders like Rummel, which includes ten to twelve years of incarceration followed by three years of direct parole supervision and four years of annual reporting, measurably contributes to the proper ends of punishment.

D. A Holding That Rummel's Punishment is Cruel and Unusual Would Be Destructive of the Ends of Justice.

Judge Thornberry, originally dissenting in the Court of Appeals to the panel opinion and later the author of

the en banc majority opinion, correctly stated as follows:

> "Whatever sociological analysis I might apply to this case, I cannot avoid the conclusion that with this decision we stand on the brink of the 'slippery slope' in its most classic sense."

(*Rummel v. Estelle*, 568 F.2d at 1202; A. 23.) If Rummel prevails in this Court, Judge Thornberry's admonition will prove true in several senses.

1. The numbers of prisoners in Texas and elsewhere that would be affected by such a holding is unknowable but potentially great.

Petitioner in his Table 1 (C. 1-21) collates the circumstances of a number of Texas habitual offenders. He concludes that only eight of three hundred eighty will be able to claim that their case is within the ambit of the holding he seeks to have the Court announce. He cavalierly concludes, "There will be no flood, just a trickle." (Brief for the Petitioner at 67 n. 83). Apart from the obvious defects in the methodology employed in utilizing only published opinions of the Texas Court of Criminal Appeals (*and see* the factors contained in Rummel's Table 1, at C. 1), even his own statistics contradict that conclusion.

In addition to the eight cases cited, the holding contended for by Rummel would be potentially applicable to all those cases in which he located one non-violent offense and two unknown offenses (30 cases), as well as those containing two non-violent offenses and one unknown offense (8 cases). (C. 19-21). Forty-six of three hundred eighty cases is a significant ratio.

2. Great confusion and even chaos would needlessly be caused among prosecutors, grand juries, and sentencing authorities.

Perhaps even more important, such a holding would introduce complete uncertainty among prosecutors, grand juries, and sentencing authorities as to the proper range of punishment in a wide variety of contexts. In the instant case, for example, Rummel contends that a sentence of life imprisonment is too much, but fails to elucidate an acceptable range of punishment for himself. Those responsible for enforcing the law in the criminal justice systems in Texas and elsewhere would simply be informed that the totality of the circumstances of a criminal defendant's offenses must be examined, in conjunction with the possible penalties that he might receive in other jurisdictions and in Texas for more serious offenses, when determining the constitutionally permissible range of punishment for a defendant's conduct. There is no guidance, for example, as to whether the burglary of a vehicle includes a "potential for violence" sufficient to invoke the statute. Nor does Rummel tell us whether "purely property offenses" when connected with public administration are raised to a level of strong social interests.

For example, bribery, Tex. Penal Code Ann. sec. 36.02 (Vernon); coercion of a public servant or voter, sec. 36.03; and official misconduct, sec. 39.01; are purely property offenses and are classified as felonies by the Texas Legislature. Numerous gambling offenses are purely property offenses and are classed as felonies. Tex. Penal Code Ann. secs. 47.01 *et seq.* (Vernon). Rummel would give us little guidance as to the proper range of punishment for such offenses. Apparently, each local district attorney, grand jury, and judge or petit jury in Texas that may contemplate a prosecution under such a statute must initially decide what important social interests are served by enforcement of the statute, even though that issue had supposedly been resolved when the Legislature approved that statute. Then local officials must compare the punishment to that possible for more "serious" offenses in Texas, as

well as that possible for comparable offenses in other jurisdictions. Finally, there must be resolved whether a less severe sentence than that permissible under the statute would serve valid rehabilitative, deterrent, and punitive purposes in light of all the above circumstances. This is simply too much to ask.

Moreover, the ambit of the opinion Rummel seeks would apply to "petty" property offenses. He understandably, however, fails to provide the dollar amount of the dividing line between petty and major offenses.

An infinite variety of variables is possible. The en banc Court of Appeals calculated that under the Texas Penal Code, there are approximately 45,190 combinations of crimes that might result in a habitual offender status and that "sooner or later, this court could expect to see many of them." (587 F.2d at 662 n. 29; A. 41.) Previously, the discretion as to punishment of crimes was thought to be properly exercised by Texas prosecutors, grand juries, and if no habitual offender statute were invoked, by the sentencing authority, whether judge or jury. Under the result contended for by Rummel, the range of punishment for many crimes would be unknown.

For such reasons as these, it is not surprising that this Court has previously expressed its reluctance to become involved in expressions of the appropriate punishment in certain circumstances:

> "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see *Radzinowicz*, The History of English Criminal Law: The Movement for Reform, 1750-1833, *passim*, these are peculiarly questions of legislative policy."

Gore v. United States, 357 U.S. 386, 393 (1958). *See United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 93 (1820).

3. The inevitable "levelling" effect would be destructive of the proper ends of democratic society and our federal system of government.

One final unfortunate result of a holding in Rummel's favor should be noted. Under such a holding, Texas under the Eighth Amendment would not be free to adopt a punishment scheme for its criminal offenders in which a relatively greater punishment than in other jurisdictions may be imposed at the outset of the defendant's incarceration in exchange for significantly greater reductions of sentence as indicia of rehabilitation are shown. Instead, Texas would be told the Constitution requires a levelling so that the Texas statutes most closely resemble those of other jurisdictions. This flies in the face of Mr. Justice Brandeis's famous admonition that the states should be free to act as laboratories of national experience. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion). It would violate this Court's admonition in *McGautha v. California*, 402 U.S. 183, 221 (1971):

> "[T]he Federal Constitution, which marks the limit of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court."

States, in short, within the limits of constitutional principles much broader than those espoused by Rummel, should be permitted to structure criminal law

"free from the suffocating power of the federal judge, purporting to act in the name of the Constitution." *Planned Parenthood v. Danforth*, 428 U.S. 52, 93 (1976) (White, J., concurring in part and dissenting in part).

Surely this case is a classic one in the manner in which its facts cry out for the exercise of judicial restraint in the face of an admittedly tempting opportunity to embark upon a grand but unwise incursion into state criminal law. In placing this case in proper perspective in this regard, Texas cannot improve upon the statement of Judge Thornberry of the Court of Appeals, originally dissenting to the panel opinion:

> "Perhaps, if I were the prosecutor, I would not have sought an indictment charging the defendant with an habitual count; if I were a state lawmaker I would vote to amend the statute so that it would not be applied as has been done here; or if I were governor of the State of Texas, I would consider the petitioner a prime candidate for clemency. But I do not hold these offices and my decision must be guided by the eighth amendment rather than my feelings of compassion and justice. In that amendment, I find nothing that compels the result reached by the majority."

(568 F.2d at 1201; A. 20.)

It has never been thought that the cruel and unusual punishment clause of the Eighth Amendment mandated the results contended for by Rummel and discussed above. Texas avers that it does not.

4. Rummel has no basis for attacking the prosecutor's valid exercise of discretion in indicting him as a habitual offender.

Rummel correctly notes the mandatory nature of the life sentence he received after the prosecutor alleged

and proved the requisite prior convictions. The Texas prosecutor, like his counterpart elsewhere, is vested with much discretion in the charging process as in many other areas. A holding that Rummel's sentence is constitutionally impermissible would necessitate holding that the prosecutor abused his discretion in the charging process.

Common sense dictates that a state prosecutor must assess a constellation of factors in setting priorities and goals in the types of crimes he desires to prosecute and the appropriate penalties he will seek under various circumstances. Texas doubts that the Court believes that the lower federal courts should be in the business of overseeing the daily exercise of prosecutorial discretion in the absence of any suggestion of vindictive or otherwise improper motives.

Such a holding would be contrary to the prior teachings of the Court in such cases as *Santobello v. New York*, 404 U.S. 257 (1971), and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Endowing federal district courts with the authority to strike down state criminal penalties as excessive on an ad hoc basis would, in light of the complexity of the Texas Penal Code, create a horde of obvious problems for both Texas prosecutors and the lower federal courts.

If, however, Texas is wrong on this point, then the State suggests at the very least it is entitled to demonstrate all factors bearing upon the original prosecutorial decision, particularly the full extent of Rummel's entire criminal history. It would be more than a little unfair, in fact, to deprive Texas of the opportunity to show Rummel's other crimes to demonstrate the reasonableness of the prosecutor's decision to seek enhancement merely because Texas law does not require such other crimes to be alleged or proved at trial.

Therefore, if the Court is dissatisfied that the record in its present state authorizes the punishment imposed, Texas prays for a remand to the district court where the State believes that it is entitled to submit additional evidence in support of the valid exercise of prosecutorial discretion in Rummel's case. (*See* footnote three at 13 and footnote four at 15, above.)

II. PETITIONER HAS PROCEDURALLY DEFAULTED ANY RIGHT TO CHALLENGE HIS PUNISHMENT AS CRUEL AND UNUSUAL BY FAILING TO OBJECT UPON THAT OR ANY OTHER BASIS AT THE PUNISHMENT PHASE OF HIS TRIAL.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), a Florida criminal defendant failed to make a timely objection to the admission of his inculpatory statements as required by that state's procedural rules. This Court, relying upon its earlier decisions in *Francis v. Henderson*, 425 U.S. 536 (1976), and *Estelle v. Williams*, 425 U.S. 501 (1976), held that absent a showing of cause for the failure to comply with the state rule and resulting actual prejudice, a federal habeas corpus review of petitioner's *Miranda* claim was barred.

Thus, *Wainwright v. Sykes, supra*, established a rule of review in habeas corpus law that has come to be recognized as the procedural default doctrine. The doctrine stands in marked contrast to the waiver rules enunciated in *Johnson v. Zerbst*, 304 U.S. 458 (1938), in that the subjective mental state of petitioner or his attorney is irrelevant to its application. It is only required that the record reflect a failure to object in compliance with a state procedural rule. *See* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX.L.REV. 193, 209-13 (1977).

Under well-established Texas law, criminal trial error is preserved for appellate or collateral review only

if a timely objection is made upon the same ground as that later asserted. *See, e.g.*, 5 TEX.JUR.2d, *Appeal & Error--Criminal Cases*, sec. 22 at 42-43, sec. 35 at 56 (1959); *Ex parte Gill*, 509 S.W.2d 357 (Tex. Crim. App. 1974); *Ex parte Bagley*, 509 S.W.2d 332 (Tex. Crim. App. 1974); *Aldrighetti v. State*, 507 S.W.2d 770 (Tex. Crim. App. 1974); *Spead v. State*, 500 S.W.2d 112 (Tex. Crim. App. 1973).

The Fifth Circuit Court of Appeals has termed the Texas rule the "correct contemporaneous objection rule," *Jiminez v. Estelle*, 557 F.2d 506, 507 (5th Cir. 1977), and has specifically upheld the rule as serving a legitimate state interest. *See, e.g., Jiminez v. Estelle, supra; Nichols v. Estelle*, 556 F.2d 1330 (5th Cir. 1977), *cert. denied*, ___U.S.___, 98 S.Ct. 744 (1978); *Loud v. Estelle*, 556 F.2d 1326 (5th Cir. 1977); and *St. John v. Estelle*, 544 F.2d 894 (5th Cir.), *aff'd en banc*, 563 F.2d 168 (5th Cir. 1977). *Cf. Wainwright v. Sykes, supra*, 433 U.S. at 83 n. 8; *Henry v. Mississippi*, 379 U.S. 433 (1965).

Rummel's trial record is devoid of any objection that the imposition of a life sentence for his crimes constituted cruel and unusual punishment under the Eighth Amendment. Rummel not only made no pretrial motion to quash the enhancing allegations of his indictment, *see* Tex. Code Crim. Proc. Ann. art. 27.03 (Vernon), but plead "true" to them at the punishment stage of his bifurcated trial. (R. 226-27). He did not object to the introduction into evidence of the prior convictions. Subsequently, the trial court asked his counsel, "Any objections to the proposed charge of the Court on punishment, Mr. Cheanault?" [sic] (R. 239). After some discussion, Chenault replied, "I have no objection." (R. 241).

The procedural default doctrine is clearly applicable,[7]

[7]Rummel failed to raise his Eighth Amendment claim on appeal. His attempt to raise it on state habeas corpus was summarily re-

unless Rummel can show "good cause" for having failed to object properly at his trial and resultant "actual prejudice." *Wainwright v. Sykes, supra,* 433 U.S. at 90-91. He cannot overcome the "good cause" hurdle in light of his full and fair opportunity to object at his punishment hearing. Indeed, the only cause that Rummel advances is mistake of counsel (Brief for the Petitioner at 72). But as the Fifth Circuit has correctly reasoned, the mistake or ineffective assistance of counsel cannot satisfy the cause exception:

> "[P]etitioner has not demonstrated cause for failing to make a timely challenge. His only allegation in this regard is that his trial attorney provided ineffective assistance of counsel in failing to so object. This assertion must be rejected, however, for, if accepted, it would effectively eliminate any requirement of showing cause at all. If a petitioner could not demonstrate any legitimate cause, he would only have to raise the spectre of ineffective assistance of counsel to get his challenge heard. This we refuse to sanction."

Lumpkin v. Ricketts, 551 F.2d 680, 682-83 (5th Cir. 1977). *See, Loud v. Estelle,* 556 F.2d 1326, 1329-30 & n. 11 (5th Cir. 1977); *cf. Jiminez v. Estelle, supra.* A contrary rule would effectively eliminate the holding in

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jected by the state conviction court (R. 35). Even if that rejection were construed as a decision on the merits, Rummel cannot evade the effect of the procedural default doctrine by asserting that his is "a case where the state courts have declined to impose a waiver but have considered the merits of the prisoner's claim." *See, Francis v. Henderson,* 425 U.S. 536, 542 n. 5 (1976). That doctrine refers to a state's uniform policy for non-application of its waiver doctrine, as is apparent from examination of *Lefkowitz v. Newsome,* 420 U.S. 283 (1975). It has no application where the state waiver doctrine remains available as an alternate basis for denial of relief.

Wainwright v. Sykes. The exception, in short, cannot be allowed to swallow the rule.

The Court of Appeals nevertheless rejected Texas' procedural default contention for two reasons, both of which are erroneous. First, the court held that the Texas Court of Criminal Appeals "has repeatedly rejected Rummel-like challenges to the Texas habitual criminal statute" and that Rummel should not have been required to "make a futile gesture at his trial." (587 F.2d at 653; A. 27.) Apart from the fact that nothing in *Sykes* sanctions a futility exception to the procedural default doctrine, Rummel has always insisted that his case is a more compelling one than those previously presented. Certainly nothing in the Texas cases rejecting "Rummel-like challenges" precludes the possibility that the Texas Court of Criminal Appeals might in a proper case find a sentence cruel and unusual solely because of its length, any more than the several previous Fifth Circuit cases rejecting such challenges precluded a Fifth Circuit panel from finding for Rummel. This is especially so since Eighth Amendment proportionality requires a case-by-case analysis.

Second, the en banc court noted that Texas requires no contemporaneous trial objection by a criminal defendant to challenge later the constitutionality of the statute under which he was convicted,[8] citing *Gann v. Keith,* 253 S.W.2d 413, 417 (Tex. 1952). But Rummel does not challenge the constitutionality of that statute; he recognizes that *Spencer v. Texas,* 385 U.S. 554 (1967),

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[8]In a related argument Rummel contends that Texas law does not impose a waiver for failure at trial to raise a constitutional claim not yet established. (Brief for Petitioner at 70). This argument fails because of his further claim that proportionality in sentencing as a constitutional principle rests on many older cases including *Weems v. United States,* 217 U.S. 349 (1910), and was reaffirmed in other cases, including *Furman v. Georgia,* 408 U.S. 238 (1972). Rummel's trial occurred in 1973.

and many other cases would be adversely dispositive of any such contention. Instead, he contends the statute is unconstitutional *as applied to him.* Each such challenge obviously rests upon its own facts and is precisely the type of question best raised initially at the trial court and as to which the trial judge should make the initial determination. In short, valid state interests would be served by applying *Wainwright v. Sykes* to this case.

Finally, Rummel attempts to invoke Rule 8(c), Federal Rules of Civil Procedure, in support of his proposition that the State has "waived its procedural default defense by failing to raise it in the district court. (Brief of Petitioner at 69). But *Wainwright v. Sykes* was not decided until after the district court proceedings were concluded and after the initial briefs were filed in the Court of Appeals. In fact, Texas raised the issue at its first opportunity -- before the en banc Court of Appeals.

In any event, Rule 11, Rules Governing Section 2254 Cases, provides that the Rules of Civil Procedure "to the extent that they are not inconsistent with these rules, may be applied, when appropriate," to habeas cases. Quite obviously, the application of Rule 8(c) is discretionary. In this case, where important comity interests are at stake, every valid factor inveighs against application of the rule.

CONCLUSION

For these reasons, the State of Texas respectfully prays that the judgment of the United States Court of Appeals be affirmed; or, in the alternative, that this cause be remanded to the United States District Court for the Western District of Texas for consideration of all the circumstances of Rummel's entire criminal history.

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